

The Power of Ohio Municipalities to Enact Private Law

The purpose of this comment is to determine whether home rule municipalities in Ohio have invaded the private law area, and if so, through what constitutional provisions and to what extent. It is the generally accepted theory that in the absence of an express grant to the municipalities the power to enact private law¹ rests with the state. The idea is so firmly entrenched it may be regarded as unwritten constitutional law.²

The general grant of legislative power under the Home Rule Amendment of the Ohio Constitution is contained in Article XVIII, Section 3, set forth herewith:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It should be noted that the above section contains two separate and distinct grants to the municipality, one absolute in terms which is supreme in regard to state legislation, and the other limited by the phrase, "not in conflict with general laws."³ It also should be noted that the term "conflict" has been interpreted to mean the situation where an ordinance permits or licenses that which the statute forbids and vice versa.⁴ "General law" has been interpreted to mean a statute or legislation enacted by the general assembly.⁵

If municipal corporations legislate in the private law area the power to do so either must be inherent or derived from the state constitution and, more specifically, from the Home Rule Amendment. Although the inherent power theory occasionally has been espoused, Ohio, along with the overwhelming majority of states, has rejected it.⁶ Ohio municipalities derive all their powers of local self-government directly from the constitution.⁷

¹"... all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals." BLACK, LAW DICTIONARY 1419 (3d ed. 1933).

²FREUND, LEGISLATIVE REGULATION § 7 (1932).

³See *State ex rel. City of Toledo v. Lynch*, 88 Ohio St. 71, 136, 102 N.E. 670, 684 (1913) (dissenting opinion).

⁴*Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

⁵*Leis v. The Cleveland Railway Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920).

⁶*State ex rel. City of Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

⁷*Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923).

Since the power is a constitutional grant, our attention is directed to Article XVIII, Section 3, and its two grants of power. If private law has been enacted it must be pursuant to the power under one of these grants.⁸ It would seem that the source of the power is not found in the first of these grants because of the following considerations.

It is apparent that in view of practical social and economic considerations uniform law in a geographical territory as wide as possible is most desirable. Technological developments in the field of communication and transportation make it desirable, if not imperative, that the citizenry of a nation move and transact business with such degree of certainty that whatever they do and wherever they may be, the "rules of the game" are the same, or at least not widely divergent. It takes no imagination to foresee the results if each hamlet and village had the power to determine under what conditions a contract would be valid.

From a purely pragmatic viewpoint, a system of jurisprudence under which the various laws of several sovereigns are interpreted and enforced by the instrumentalities of another sovereign poses practical considerations of expediency and justice, the magnitude of which only can be conjectural. At the minimum such a system would be calculated to aggravate the problems of an already overburdened judiciary.

It is believed that the legislative power devolved upon the municipal corporation under the grant of "all powers of local self-government" embraces only the power of local organization and administration. It does not include the power to enact law governing ordinary civil relations.⁹

If, then, the source of municipalities' power to enact private law does not lie in the powers of local self-government, it would seem that it must come, if at all, from the limited grant of power "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." From an examination of the cases dealing with the grant, it is manifest that municipalities legitimately can enact legislation having an indirect impact of great force upon the area of private law. For example, an ordinance enacted by the city of Cleveland was permitted to stand although it regulated the maximum number of hours employees were permitted to work when engaged in public works.¹⁰ A greater impact upon private rights is apparent in the area of zoning regulations where private rights are restricted as to the use of property and violations may be en-

⁸ The possibility of enactment of private law under OHIO CONST. Art. XVIII, § 4 is discussed in a subsequent paragraph.

⁹ Fordham, *Local Government*, 9 LA. MUNIC. REV. 40 (1946).

¹⁰ *Stange v. Cleveland*, 94 Ohio St. 377, 114 N.E. 261 (1916).

joined.¹¹ In another case, a taxicab owner was required to post a liability bond as a condition precedent to operation of his cab upon the streets of the city.¹² Examples are numerous wherein the violation of a local traffic ordinance has been held to be negligence per se.¹³ It is apparent that a reasonable and non-arbitrary police regulation validly enacted by a municipality may affect the rights of a private individual and still not fall within the category of private law in the sense in which it is used herein.¹⁴

A municipality operating a public utility under the authority granted in Article XVIII, Section 4, may affect rights of a private individual to a limited extent. It has been held that a property owner may be liable under authority of an ordinance for his tenant's water bill. The liability may be enforced through court action and/or denial of further service to the property. A lien will not attach to the property under authority of the ordinance.¹⁵ It is apparent that again we have impact upon but not the enactment of private law.

The above analysis would appear to indicate that there is no area in which the enactment of private law is contemplated. However, in the case of *Leis v. Cleveland Ry. Co.*¹⁶ the city of Cleveland adopted an ordinance requiring the motormen of streetcars operated within the city to exercise *all* possible care. The plaintiff was injured by a streetcar operated by an agent of the defendant company and the trial court found the defendant liable by holding it to the standard of care established by the ordinance. The supreme court affirmed the decision on the ground that the ordinance was a reasonable police regulation, was applicable only within the city and was not in conflict with general law since no statute had been passed by the general assembly establishing a standard of care for streetcar operators. The common law standard of care was held not to be a general law in the sense that the term was used in Article XVIII, Section 3. Private law here was enacted by the city since the ordinance not only established a standard of care in an action between two individuals but also, in this particular case, allowed a recovery which would not have been possible under the common law standard of care. The court in its opinion did not discuss this aspect of the case but based the decision on the grounds already stated.

¹¹ *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925).

¹² *State ex rel. McBride v. Deckebach*, 117 Ohio St. 227, 157 N.E. 758 (1927).

¹³ *Patton v. Pennsylvania R. R.*, 136 Ohio St. 159, 16 Ohio Op. 114, 24 N.E.2d 597 (1939).

¹⁴ *Fordham*, *supra* note 9, at 40.

¹⁵ *Pfau v. Cincinnati*, 142 Ohio St. 101, 50 N.E.2d 172 (1943).

¹⁶ 101 Ohio St. 162, 128 N.E. 73 (1920).

In contrast, in *Wilson v. East Cleveland*¹⁷ the court held invalid an attempted regulation of private law by the city. The general assembly by General Code Section 3714 imposed a liability on municipalities for breach of the duty of maintaining their streets in a safe condition. The city charter contained a provision that required any person bringing a suit against the city under Section 3714 to give written notice of the claim within thirty days after the cause of action accrued. The court stated that failure to comply with the charter provision would result in a waiver to the right of the cause of action and that such a condition precedent was invalid as being in conflict with general law since the statute imposing the liability did not prescribe such a condition for the attaching of the liability. To reach this result it was necessary for the court to expand the meaning of conflict as defined in the Ohio cases dealing with the Home Rule Amendment.¹⁸ Again, the court did not discuss the effect of the ordinance upon private law. Conceivably, the court could have based its decision upon the municipality's lack of power to enact private law if such power, is, in fact, lacking.

The case of *Carnabuci v. City of Norwalk*¹⁹ presents another interesting facet of the problem. A zoning ordinance was adopted by the city and put into effect in 1938. In 1941 the defendant applied to the State Department of Liquor Control for a permit to manufacture wine at her residence which was located in a zoned residential district, a fact stated in the application. The Department of Liquor Control issued the permit. Thus, a permit issued under the authority of a valid general law authorized the doing of an act which was prohibited by an ordinance of the city. It should be noted that zoning is an exercise of the police power. The court split 2-1, the majority saying:

"The power and authority of the city to enact the ordinance is at least commensurate with that of the Department of Liquor Control to issue the permit, and it and the city must take cognizance of the lawful exercise of the power and authority possessed by the other."

The dissenting judge stated flatly that there was a direct conflict and that the ordinance must fall.

In all probability Ohio municipalities under the Home Rule Amendment have not been granted the authority to enact private law but thus far this question has never been authoritatively decided. Admitting the soundness of the *Leis* case, it would appear

¹⁷ 121 Ohio St. 253, 167 N.E. 892 (1929).

¹⁸ *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923); *Wilson v. Zanesville*, 130 Ohio St. 286, 199 N.E. 187 (1935), *overruled on other grounds*, *Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

¹⁹ 70 Ohio App. 429, 46 N.E.2d 773 (1942).

that the court has created an area in which municipalities may conceivably enact private law. This would seem to follow from the fact that general law as defined by the court does not include the common law of the state. Conceding that municipalities expressly must be granted the power to enact private law, we are faced with the anomalous situation in which the court has given by implication an express grant of this power by the definition of general law. Thus, the phrase in the constitution is interpreted to read, "to adopt and enforce . . . regulations as are not in conflict with laws passed by the general assembly." Therefore private law which is in the realm of the police power will stand even though in conflict with common law. It should be noted that general law as usually construed includes common law, and therefore, this field is not open to municipalities in other states.²⁰ Room for further speculation is presented by the holding in the *Carnabuci* case. The divided court there upheld a regulation which was in direct conflict with state law. The regulation was in the field of zoning, which we have classed as having impact upon private law, but the rationale used by the court would be equally valid in other fields of municipal endeavor and could be, under the authority of the *Leis* case, extended to the field of private law.

In conclusion, it would seem that a salutary result has been achieved. The areas in which it is possible to enact private law are confined to (a) legislation under the police power which changes only the common law, and (b) that area created by the court's extension or restriction of the term "conflict".²¹ Thus, the only municipal legislation that could invade the field of private law would be such as was vital to the welfare of the municipality and not inimical to the interests of the state. Any municipal ordinance not conforming to these requirements could be nullified by the state legislature acting in the common law field or by the state courts in applying the term "conflict" to a set of facts. Sharply defined lines seldom can be drawn in the fields of government. The areas created serve a very real purpose in minimizing the unavoidable friction between state and city governments.

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²⁰ FREUND, *op. cit. supra*, note 2, § 7.

²¹ *Wilson v. East Cleveland*, 121 Ohio St. 253, 167 N.E. 892 (1929).